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IN THE

Supreme Court of the United States

October Term, 1966
No. 24

SOUTHERN CALIFORNIA EDISON COMPANY,
Appellant,

vs.

EL PASO NATURAL GAS COMPANY, *et al.*,
Appellees.

On Appeal From the United States District Court for the District of Utah, Central Division.

Brief of Southern California Edison Company in Support of Its Appeal.

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SOUTHERN CALIFORNIA EDISON COMPANY,
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Appellees.

Brief of Southern California Edison Company in Support of Its Appeal.

I.
OPINIONS BELOW.

On June 24, 1965, the District Court below signed and entered a Decree of Divestiture in *United States of America v. El Paso Natural Gas Company, et al.*, Civil No. 143-57 [R. 2172]. On the same date, the District Court orally denied Edison's Application for Leave to Intervene, which had been previously filed with the Court on June 22, 1965. Under date of June 28, 1965, the District Court signed a formal written Order denying Edison's said Application for Leave to Intervene, which Order was entered on June 29, 1965 [R. 2186]. No Memorandum Opinion in support of the formal Order denying intervention was entered by the Court.

These Orders have not been published in the official reports of the Federal Reporter.

II.
JURISDICTION.

In its application filed in the District Court, Edison sought to intervene as a matter of right under (1) Rule 24(a)(2) of the Federal Rules of Civil Procedure and (2) Rule 24(a)(3) of the Federal Rules of Civil Procedure. Alternatively, Edison sought premissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure.

The Jurisdiction of the Supreme Court to review the Order Denying Edison's Application for Leave to Intervene is conferred by the Expediting Act, Title 15 U.S.C.A. Section 29, 32 Stat. 823 (1903 as amended), 36 Stat. 1167 (1911), 58 Stat. 272 (1944), 62 Stat. 989 (1948) and is sustained by the following authorities:

1. *Sam Fox Publishing Co. v. United States,* 366 U.S. 683, 6 L. Ed. 2d 604, 81 S. Ct. 1309 (1961);

2. *Sutphen Estates v. United States,* 342 U.S. 19, 96 L. Ed. 19, 72 S. Ct. 14 (1951), reh. den. 342 U.S. 907, 96 L. Ed. 679, 72 S. Ct. 289;

3. *Ford Motor Co. v. Bisang Bros., Inc.* (C.A. 8, Minn.), 249 F. 2d 22 (1957);

4. *Allen Calculators v. Cash Register Co.,* 322 U.S. 137, 88 L. Ed. 1188, 64 S. Ct. 905 (1944); reh. den. 322 U.S. 771, 88 L. Ed. 1596, 64 S. Ct. 1257;

5. *Missouri-Kansas Pipe Line Co. v. United States* (C.A. 3rd, 1939), 108 F. 2d 614, cert. den. 309 U.S. 687, 84 L. Ed. 1030, 60 S. Ct. 887;

6. *Continental Ins. Co. v. United States,* 259 U.S. 156, 66 L. Ed. 871, 42 S. Ct. 540 (1922);

7. *United States v. DuPont De Nemours & Co.*, 366 U.S. 316, 6 L. Ed. 2d 318, 81 S. Ct. 1243 (1961).

Edison's notice of appeal and jurisdictional statement also raised the question of the compliance of the decree with this Court's earlier mandate. Since that matter has been brought to its attention in a proper manner, the Court in this appeal has the inherent power and jurisdiction to review the Decree of Divestiture entered by the District Court to ascertain whether it complies with this Court's mandate. *Continental Insurance Co. v. United States*, 259 U.S. 156, 166, 66 L. Ed. 871, 881, 42 S. Ct. 540 (1922) and *United States v. DuPont De Nemours & Co.*, 366 U.S. 316, 325, 6 L. Ed. 2d 318, 324-325, 81 S. Ct. 1243 (1961). On January 17, 1966, this Court issued its order noting probable jurisdiction in the appeals pending in this docket and related dockets, Nos. 4 and 5, October Term, 1966.

III.

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

1. Does the District Court's Decree of Divestiture comply with the Mandate of this Court entered in *United States v. El Paso Natural Gas Company, et al.*, 376 U.S. 651, 12 L. Ed. 2d 12, 84 S. Ct. 1044?

2. Is Edison entitled to intervene as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure?[1]

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[1] "Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inade-

(This footnote is continued on the next page)

a. Does Edison have a protectible interest in the divestiture proceedings?

b. May Edison be bound by the Decree of Divestiture?

c. Are the interests of Edison being adequately represented?

3. Is Edison so situated that it will be adversely affected by the disposition of property to the New Company under the Decree of Divestiture within the meaning of Rule 24(a)(3) of the Federal Rules of Civil Procedure?[2]

4. Did the District Court's denial of Edison's Application for Leave to Intervene constitute an abuse of discretion within the meaning of Rule 24(b)(2) of the Federal Rules of Civil Procedure?[3]

IV.

STATEMENT OF THE CASE.

Acquisition of Pacific Northwest Stock by El Paso and Commencement of Suit Under Clayton Act.

In November 1956, the Board of Directors of the Pacific Northwest Pipeline Corporation approved the exchange of shares of stock of the El Paso Natural Gas

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quate and the applicant is or may be bound by a judgment in the action; or" (Title 28, U.S.C.A., F.R.C.P. Rule 24(a).) See *infra*, Argument, Section VI, 2 and footnote No. 64.

[2]"(3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." (Title 28, U.S.C.A., F.R.C.P., Rule, 24(a).) See *infra*, Argument, Section VI, 2 and footnote No. 64.

[3]"Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common." (Title 28, U.S.C.A., F.R.C.P., Rule 24(b).)

Company for shares of stock of Pacific Northwest. By May 1957, El Paso had acquired 99.8% of Pacific Northwest's outstanding stock. In July 1957, the Department of Justice filed an action in the Federal District Court for the State of Utah, Central Division, charging that this acquisition violated Section 7 of the Clayton Act.

Intervening FPC Hearing and Its Outcome.

In August 1957, El Paso applied to the Federal Power Commission for permission to acquire the assets of Pacific Northwest. On December 23, 1959, the commission approved and the merger was effected on December 31, 1959. In 1962, this Court set aside the Commission's Order, holding that it should not have acted until the District Court had passed on the Clayton Act Issues. *People of the State of California v. Federal Power Commission,* 369 U.S. 482, 82 S. Ct. 901, 8 L. Ed. 2d 54.

Mandate of This Court Ordering Divestiture.

During the pendency of the FPC proceedings, the United States amended its complaint to include the asset acquisition in the charged violation of the Clayton Act. There was a trial following which the District Court entered a judgment holding that the stock acquisition and the asset acquisition by El Paso did not violate the Clayton Act.

On a direct appeal brought by the United States, this Court reversed the District Court's judgment, this Court holding that " 'the effect of such acquisition may be substantially to lessen competition' within the meaning of §7 of the Clayton Act." *United States v. El Paso Natural Gas Company,* 376 U.S. 651, 657, 84

S. Ct. 1044, 12 L. Ed. 2d 12. This court not only reversed the District Court, but directed it "to order divestiture without delay."

Proceedings in the District Court Following This Court's Mandate.

The decision containing the Supreme Court's Mandate was rendered on April 6, 1964. Following that date several hearings were held by the District Court in connection with the divestiture.

The first such hearing was held on July 8, 1964, when the Government's counsel requested that the proposed divestiture hearing "be put over for a period of approximately ninety days, so that we can come into court with a definitive proposal to present before your Honor." [R. 39]. Indicative of the initial desire by the Government to work out a divestiture arrangement which would comply with this Court's mandate counsel for the Government at such time also stated:

> "Your Honor, shortly after the Supreme Court handed down its decision the Department took the position that it must accomplish divestiture and the outcome would have to be a re-establishment of the Pacific Northwest Pipe Line Corporation as a viable and independent company with a proper allocation of the assets of the present combined company." [R. 43].

The Court, after discussion, granted the Government's request [R. 44].

The second hearing before the District Court on divestiture convened on October 19, 1964. At that time counsel for El Paso offered in evidence its proposal for divestiture [Deft. Ex. A; R. 1835, 162; R. 142

et seq.], and presented testimony with respect to the details of the El Paso proposal.

At that hearing Government counsel asked the Court for "at least forty-five days, * * * to properly evaluate the plan as recently submitted to us." [R. 177]. Government counsel added: "We have some problems with the plan as presented. We want to carefully look at it before we reach a decision in our minds as to what position we should take." [R. 178]. Pursuant to this request the Court set its third hearing date for December 2, 1964 [R. 179-180].

The hearings resumed on December 2, 1964, pursuant to the order of the District Court. They then continued through December 2, 3, 4, 8, 9, 10 and 11, 1964, during which time El Paso introduced further evidence in support of its plan of divestiture. El Paso's witnesses were cross-examined at length by Government counsel.

During the course of these and the succeeding hearings, counsel for the Government vigorously opposed the El Paso plan of divestiture. That opposition centered on the following five main points:

1. That El Paso's "spin-off" plan for disposition of the stock in the New Company was not calculated to establish the New Company as an entity independent of El Paso control.

2. That the divestiture plan failed to make any provision for the return of an appropriate portion of the reserves acquired in the San Juan Basin during the period when competition from Pacific Northwest was suppressed.

3. That the divestiture plan provided for the unilateral modification of contracts which existed between the two companies at the time of the merger, to the detriment of the New Company.

4. That the divestiture plan failed to provide for the return of stock of Westcoast Transmission Company, Ltd., which was a Pacific Northwest asset prior to the merger.

5. That the divestiture plan failed to compensate New Company for the substantial benefit which El Paso obtained and of which Pacific Northwest, subsequent to the merger, was deprived, arising out of the use by El Paso of certain tax loss carry-overs of Pacific Northwest existing at the time of the merger.

These points were argued in detail by the Government's counsel.[4] There was never any indication during the December or any subsequent hearings before submission that the Government ever receded from any of these positions.

In addition to opposing the El Paso plan of divestiture on the points mentioned above, the Government proposed an alternate plan. In this connection, counsel for the Government stated in part during the hearing on December 3, 1964:

> "* * * it is incumbent on the Government to show that it does more than merely oppose a plan that is presented before the court, but I think we have a duty to inform the court that there are other alternatives available * * *"[5]

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[4]R. 740-750; R. 772; R. 867-895; R. 963-985; R. 996-1002; R. 1007-1009; R. 1266-1273; R. 1281-1300; R. 1338-1339; R. 1344-1348; R. 1353-1356.

[5]R. 716-717.

Following the December 11, 1964 hearing, there were no further hearings until January 25, 1965. In the interim, on January 6, 1965, the Government filed its "Brief Opposing Defendant El Paso's Plan of Divestiture and Presenting Plaintiff's Alternative Plan."[6] The Government's expressed opposition to the El Paso plan of divestiture again centered around the five points mentioned above.

Among other things, the brief stated:

> "We believe that the El Paso Plan of Divestiture fails to provide for appropriate relief. Instead it tends to perpetuate the very anti-competitive effects this litigation was intended to prevent."[7]

The Government's brief referred to a suggested appended alternative form of decree which was marked for identification as "Plaintiff's Exhibit 2," but which was apparently never formally offered or received in evidence. Generally that proposed decree, as summarized in the Government's Brief, described assets which must be divested, and provided an opportunity for third parties to present to the Court specific proposals for the purchase and operation of the divested facilities.[8]

The divestiture hearings were continued on January 25, and 27, 1965. At that time, the Government introduced evidence through three witnesses, Peter King, O. L. Carson and Roger L. Conkling who testified concerning the existence of third parties who, the witnesses believed, had the ability, managerial skill and resources

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[6]R. 1049.

[7]R. 1051.

[8]Pltf. Ex. 2; R. 1584; Government's Brief Opposing El Paso's Plan of Divestiture; R. 1051; R. 1075-1076.

to acquire and competitively operate the assets and properties to be divested.[9]

The transcript of these January 1965 hearings is devoid of any arguments, statements or representations of the Government altering in any way its opposition to the El Paso plan of divestiture.

The final hearings before submission in connection with the divestiture were held on February 3 and February 4, 1965. At the February 3 hearing, counsel for El Paso submitted an amended form of decree which, except for certain changes with respect to the planned "spin-off," was essentially the same as the proposed decree previously submitted by it.[10] On the same day, counsel for the Government in commenting upon this proposed amended decree of El Paso stated in part as follows:

> "The memorandum with respect to the proposed El Paso divestiture decree which was given to us this morning states, together with my statement of the prior session—I forget the date—states the Government's opposition to this method of procedure. Unfortunately I find myself unable to comment with great detail on plaintiff's proposed decree, since it was handed to us a few minutes before, but to the extent that it generally comports with the earlier description our objections remain."[11]

On February 4, 1965, the date of the last hearing on divestiture other than the proceedings at which the final decree was submitted and signed, counsel for the Gov-

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[9]R. 1177-1220.
[10]R. 1259-1266.
[11]R. 1267.

ernment again reiterated its opposition to the El Paso plan of divestiture. In that respect, Government counsel stated in part as follows:

> "Your Honor, in a certain respect, that is what the Government is saying; and that is with respect to competition for the California market. This company that is being set up under the El Paso proposal is, if I may use the word, straitjacketed to serve the Northwest markets. It is not in any position to serve the California markets.
>
> "With respect to an expansion program to the California markets, the company is not as strong as the company had been before. It is not as likely to be able to serve the California markets as Pacific Northwest was at the time of the acquisition in this case."[12]

On February 19, 1965, the Government filed with the Court its "Brief After Divestiture Hearings." In that Brief the Government commented at length upon the points in opposition to the El Paso proposal which it had previously urged. In the introduction to this brief the Government stated in part as follows:

> "In general, the object sought by the Government has remained constant throughout these proceedings. We seek to reconstitute Pacific Northwest Pipeline Corporation — or New Company — as a viable pipeline, able to serve its markets and able to expand to serve other markets. We seek to reestablish this company in such a way as to enable it to offer competition to El Paso for the California market and elsewhere."

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[12]R. 1355-1356.

Following its discussion[13] of the five points upon which it opposed the El Paso plan and a discussion of the divestiture plans proposed by the Government, the brief concludes: "For the foregoing reasons the proposal for divestiture submitted by El Paso should be rejected."[14]

On the same date, February 19, 1965, the Government submitted its proposed Findings of Fact and Conclusions of Law. The Findings of Fact set out the basis of the Government's position opposing the El Paso plan and favoring the alternate plan which it suggested. The Government's suggested Conclusions of Law were as follows:

> "1. In view of the fact that there are available alternatives which would provide for completely separate and independent ownership of the New Company, the El Paso proposal, under which the New Company would be owned by the stockholders of El Paso, does not provide for an acceptable form of divesture.
>
> "2. The El Paso proposal is inadequate in that it would permit El Paso to retain benefits which it acquired through its violation of Section 7 of the Clayton Act and would fail to re-establish the New Company in the same position which Pacific Northwest would occupy had it not been for the acquisition and merger.
>
> "3. Contracts and arrangements entered into between Pacific Northwest and El Paso prior to the date of the merger should be reinstituted. The ques-

[13] R. 1416-1443.
[14] R. 1443.

tion of whether modifications should be made in those contracts and arrangements and, if so, the form which such modifications should take, are issues which should be deferred to the Federal Power Commission." [R. 1414.]

The May 24, 1965, Stipulation and Edison's Action With Respect Thereto.

On May 24, 1965, a stipulation was entered into between the United States and El Paso and filed with the District Court.[15] This was the first opportunity given to anyone interested or affected to learn of the contents of such stipulation. It provided for the entry of a Decree of Divestiture which was substantially the same as the plan of divestiture previously proposed by El Paso.

Edison on June 11, 1965, set forth its objections contained in a letter addressed to the Court.[16] Thereafter, on June 22, 1965 and within a reasonable time, Edison filed with the District Court its application for Leave to Intervene.[17]

Denial of Edison's Application for Leave to Intervene and Entry of Decree.

On June 24, 1965, the District Court in an oral opinion denied Edison's Application for Leave to Intervene.

On the same day a Decree of Divestiture, identical in form and substance with the form of decree attached to the stipulation, was entered. Except for certain changes in the stock spin-off, the decree incorporated all the points to which the Government had raised such

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[15] R. 2024.
[16] R. 2040.
[17] R. 2078.

vigorous opposition throughout all the divestiture hearings.[18]

On June 29, 1965, the District Court entered its formal written Order denying intervention which was dated June 28, 1965.[19]

On July 23, 1965, Edison filed with the Clerk of the District Court its Notice of Appeal to the Supreme Court of the United States.[20]

After Edison submitted its Jurisdictional Statement and Brief opposing the Government's and El Paso's Motion to Dismiss or Affirm, the Supreme Court noted probable jurisdiction.

V.

SUMMARY OF ARGUMENT.

Edison's argument urges two main points: First, the Decree of Divestiture entered by the District Court fails to comply with this Court's mandate. Second, Edison is entitled to intervene as a matter of right under Rule 24(a) of the Rules of Civil Procedure, or in the alternative, is entitled to permissive intervention under Rule 24(b).

As to the first point, the failure of the District Court to comply with the mandate has been brought to the attention of this Court in a proper way through this appeal. Therefore, this Court has the inherent power to review the Decree of Divestiture to determine if it complies with the mandate and, if it does not, to enter such orders as are necessary to insure that the mandate is followed.

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[18]R. 2172.
[19]R. 2188.
[20]R. 2201.

The Decree of Divestiture fails to establish the New Company in a competitive position similar to the one occupied by Pacific Northwest prior to the merger. This results from the fact that the Decree fails to establish a New Company with both the *will* and the *ability* to compete for the California gas markets. As to the *will* to compete, the District Court's Decree postpones for an indefinite time the actual divestiture of the assets acquired by the illegal merger. It also leaves in doubt the question of continuing control by El Paso, even after divestiture, since El Paso will continue to benefit from the New Company and El Paso, or its stockholders, could influence or dominate the New Company beyond the time of actual divestiture.

The New Company is much weaker than Pacific Northwest before the illegal merger and therefore lacks the ability to compete for the California markets for four main reasons: First, the Decree fails to give New Company an equitable portion of the available gas reserves. Second, the Decree sanctions unilateral changes made by El Paso in two contracts negotiated before the illegal merger which are detrimental to New Company. Third, the Decree fails to transfer to New Company certain stock in Westcoast Transmission Company Ltd. owned by Pacific Northwest before the illegal merger. Fourth, the Decree fails to compensate New Company for certain tax loss carryovers possessed by Pacific Northwest at the time of the merger.

As to the second point, Edison is entitled to intervene as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure because Edison has a protectible interest in the divestiture proceedings and it will be bound by the Decree of Divestiture. Furthermore,

these interests since the stipulation between El Paso and the government have no longer been adequately represented in the litigation. Edison's interest stems from its necessary reliance upon natural gas as a major energy source, being the largest single gas consumer in Southern California. Therefore, it has a great and growing need for competitive gas service to enable it to serve economically its many customers. Failure to permit it to intervene effectively precluded it from any other remedy.

During all of the hearings, the government vigorously opposed the plan for divestiture advanced by El Paso for the very reasons now advanced by Edison in support of this appeal. With certain minor changes noted herein, the El Paso plan for divestiture is identical with the Decree entered by the District Court. The record of the hearings in divestiture is devoid of any modification of the government's opposition to the El Paso plan. Notwithstanding this, the government, following the formal hearings, entered into a stipulation for a Decree of Divestiture which embodied the very points which it had so vigorously opposed. This sudden and unexplained about face is the circumstance which resulted in Edison's loss of adequate representation of its interests.

Under these circumstances, the District Court, in any event, abused its discretion in denying Edison leave to intervene.

VI.

ARGUMENT.

1. DOES THE DISTRICT COURT'S DECREE OF DIVESTITURE COMPLY WITH THE MANDATE OF THIS COURT ENTERED IN UNITED STATES v. EL PASO NATURAL GAS COMPANY, ET AL.?

Edison urges that the District Court's Decree of Divestiture fails to comply with this Court's Mandate entered in *United States v. El Paso Natural Gas Company, et al.*, 376 U.S. 651. Full compliance with that Mandate will require establishing the New Company as a wholly independent entity and with an equitable allocation of assets and resources to enable it to occupy a competitive position with respect to El Paso similar to that which Pacific Northwest occupied prior to the merger. The record clearly demonstrates that the District Court's Decree of Divestiture fails to accomplish either of these purposes.

A. The Decree of Divestiture Fails to Establish the New Company in a Competitive Position Comparable to the One Occupied by Pacific Northwest Prior to the Merger.

There are at least four aspects of the District Court's Decree of Divestiture which prevent the New Company from competing as effectively with El Paso as Pacific Northwest was able to do prior to the merger. These four aspects are analyzed and discussed in detail below. Throughout the hearings the Government vigorously urged these points in opposing the El Paso plan, but in the stipulation abandoned them with reference to the meaning of "competitive position" as it applied to El Paso and Pacific Northwest prior to the

merger and as it applies to El Paso and New Company after divestiture; it may be pointed out that this Court noted in its decision ordering divestiture that the issue of whether El Paso's acquisition of Pacific Northwest violated Section 7 of the Clayton Act revolved ultimately around the question of "whether the acquisition substantially lessened competition in the sale of natural gas in California . . ."[21] It was noted that while Pacific Northwest had no pipeline into California, it was still a substantial factor in the California market as evidenced by its effect on El Paso's dealings with Edison. In this respect, it was stated in this Court's opinion, in part, as follows:

> "Pacific Northwest, though it had no pipeline into California, is shown by this record to have been a substantial factor in the California market at the time it was acquired by El Paso."[22]

It was also stated:

> "Edison's search for a firm supply of natural gas in California, when it had El Paso gas only on an 'interruptible' basis, illustrates what effect Pacific Northwest had merely as a potential competitor in the California market. Edison took its problem to Pacific Northwest and, as we have seen, a tentative agreement was reached for Edison to obtain Pacific Northwest gas. El Paso responded, offering Edison a firm supply of gas and substantial price concessions. We would have to wear blinders not to see that the mere efforts of Pacific North-

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[21] *United States v. El Paso Natural Gas Company, et al.*, 376 U.S. 651, 652.

[22] *Ibid.* p. 658.

west to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the State."[23]

In reference to the effect of "incremental needs" on competition, it was further stated "The competition then is for the new increments of demand that may emerge with an expanding population and with an expanding industrial or household use of gas."[24]

In determining whether the Decree of Divestiture places the New Company in as good a competitive position as Pacific Northwest occupied prior to the merger, it is imperative to look primarily to the competitive position New Company will occupy with respect to the California market.[25]

(1) The Divestiture Decree Does Not Give New Company an Equitable Portion of the Available Gas Reserves.

Unless the New Company is given substantial additional quantities of gas reserves, it will not be in as good a competitive position as Pacific Northwest occupied prior to the merger. Under the divestiture decree the New Company is alleged by El Paso to receive

[23] *Ibid.* p. 659.

[24] *Ibid.* p. 660.

[25] It is significant that on the last day of the public hearings held in the divestiture proceedings, counsel for the Government stated:

"This company that is being set up under the El Paso proposal is, if I may use the word, straight-jacketed to serve the Northwest markets. It is not in any position to serve the California markets.

"With respect to an expansion program to the California markets, the company is not as strong as the company had been before. It is not as likely to be able to serve the California markets as Pacific Northwest was at the time of the acquisition in this case." [R. 1355-1356].

7,592.9 billion cubic feet of natural gas."[26] At the time of the merger, however, Pacific Northwest had reserves of 10,496.7 billion cubic feet.[27] Under the divestiture decree, New Company has a reserve life index of 27.4 years[28] which will compare with Pacific Northwest's reserve life index prior to the merger of approximately 64 years.[29] If the New Company were to serve the California market with a small quantity of 250 thousand Mcf per day, the New Company's reserve life index would drop substantially to only 20.6 years. El Paso's President also testified that if the 250 million cubic feet increment to California were to be measured by the industrial standard of "deliverability life," the New Company's deliverability life would be reduced from 14 years to only 2 or 3 years.[30]

If then, New Company must have additional gas reserves in order to place it in a comparable competitive position with El Paso, the logical place from which it should obtain those gas reserves is the San Juan Basin. El Paso's President testified that at the time Pacific Northwest obtained its original certificate from the Federal Power Commission, it was expected that it would obtain its gas supplies exclusively from the San Juan Basin.[31] Even at the time of the merger the San Juan

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[26]Deft. Ex. A; R. 1865, 162.

[27]Pltf. Ex. 12; R. 1799, 766.

[28]Deft. Ex. A; R. 1865, 162.

[29]Based upon 1959 sales of 163,800 MMCF of gas [Table 9a of GX-13; R. 1377] and reserves as of December 31, 1959 of 10,496.7 MMMCF [Pltf. Ex. 12; R. 1799, 766].

The reserve life index is arrived at by taking the total quantity of reserves available to a pipeline and dividing into that total the quantity of gas which was produced and sold in the previous year [R. 151].

[30]R. 751.

[31]R. 155-156.

Basin constituted Pacific Northwest's principal gas supply source with 45 per cent of its total reserves being located there.[32]

In addition to these factors, it is noted that the San Juan Basin is geographically closer to the burgeoning Southern California market than any other field involved.[33] It was in this area that Pacific Northwest and El Paso competed so vigorously prior to the illegal merger. Furthermore, as El Paso's President testified, the wellhead price of fourteen cents pers m.c.f. of gas in the San Juan Basin is the cheapest price of any gas available in the fields serving the Pacific Northwest system.[34]

The low cost of this San Juan Basin gas and its proximity to the California market makes it particularly desirable that it be transferred to the New Company in the divestiture if competition for the California market is to be preserved.

Following the illegal merger, the merged company developed large new quantities of gas in the San Juan Basin, and in its 1962 annual report El Paso emphasized the importance of these discoveries in serving the California market.[35] However, the New Company does not share in any of these new reserves under the Decree of Divestiture, and this notwithstanding the fact that such gas was discovered by the merged company representing the interests of El Paso and Pacific Northwest.[36] Thus, as to the San Juan Basin reserves the New Company will own smaller total reserves and will hold a com-

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[32]Pltf. Ex. 12; R. 1799, 766.
[33]R. 726.
[34]R. 725-726.
[35]Pltf. Ex. 5; R. 1220, 675.
[36]R. 675-677.

paratively smaller percentage of the reserves than was true of Pacific Northwest prior to the merger.[37] Furthermore, A. M. Derrick, Manager of El Paso's Reservoir Engineering Department, testified that as of December 31, 1959, Pacific Northwest owned 21.3 per cent of the combined reserves in the San Juan Basin but that New Company would own only 17.01 per cent of the combined reserves.[38] This difference in percentage of ownership alone represents a total of approximately 640 billion cubic feet of gas reserves.

The Decree of Divestiture fails to compensate the New Company for its failure to receive an equitable share of the gas discovered in the San Juan Basin after the merger or for the depletion of the total quantity owned by Pacific Northwest at the time of the merger. While it is true that a certain gas supply from Canadian sources (the Kingsgate gas), acquired after the merger, will be transferred to the New Company, Pacific Northwest had practically completed negotiations for the acquisition of this gas prior to the merger and El Paso's President admitted that in concluding this contractual arrangement El Paso merely followed up the negotiations which Pacific Northwest had initiated.[39] The fact that these reserves were considered as Pacific Northwest reserves is suggested by the fact that they were shown as belonging to Pacific Northwest in official reports filed with the Federal Power Commission.[40]

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[37]Pltf. Ex. 14; R. 1801, 776; Pltf. Ex. 15; R. 1802, 780; Pltf. Ex. 16; R. 1804, 781.

[38]R. 951. Significantly, the Government's Exhibit 16 [Pltf. Ex. 16; R. 1804, 781], itself derived from El Paso data, shows new company's share of San Juan reserves as allocated under the decree to have declined from 27.53% as of December 31, 1959, to 17.01% as of December 31, 1963.

[39]R. 150; R. 630-631.

[40]Pltf. Ex. 17; R. 1805, 782.

(2) The Decree of Divestiture Sanctions Unilateral Changes Made by El Paso in Two Contracts Negotiated Before the Merger Which Are Detrimental to New Company.

The Decree of Divestiture provides that El Paso and New Company will enter into four contracts after the New Company has been organized.[41] The terms and provisions of these contracts are not to be subject to negotiation between the parties but are to be executed in the form set out in the decree. Two of these contracts, the Kingsgate Gas contract and the San Juan Gas Gathering contract, were negotiated between El Paso and Pacific Northwest prior to the merger. The substance of these contracts, as contained in the El Paso plan of divestiture and the decree, differ in several important respects from the contracts negotiated before the merger. These changes, which are commented on below, were unilaterally made by El Paso without approval or concurrence of any person or company who might succeed to the assets to be divested or without the approval of any affected Governmental regulatory body. All these changes are to the detriment of the New Company and to the advantage of El Paso and will reduce New Company's ability to compete effectively with El Paso or other companies engaged in a similar business.

(a) *The Kingsgate Gas Contract.*

The amended version of this contract as contained in El Paso's plan of divestiture imposes on New Company the obligation to take the entire quantity of a large volume of gas to be delivered from Canada under an agreement with Westcoast Transmission Company, Ltd. The

[41] Deft. Ex. A; R. 1848-1864, 162.

principal detriment to New Company under this revision is that it obligates New Company at a high 90 per cent load factor which will require that New Company take a daily volume of 135 million cubic feet.[43] El Paso recognized that during certain periods New Company might find it difficult to "digest" gas under such a high load factor[43] and it therefore proposed in its plan to give New Company an option to sell a portion of this gas to El Paso over a five-year period. This option covers a comparatively small quantity of gas, however, and the annual quantity declines rapidly.[44]

In comparison to this harsh provision, Pacific Northwest had worked out a much more acceptable arrangement under what is known as the "X-5 Tariff." While this tariff was not actually executed prior to the effective date of the merger, it was filed with the Federal Power Commission before the merger by El Paso and Pacific Northwest.[45] Under the X-5 Tariff, Pacific Northwest had the option to take as much or as little of this Kingsgate gas as it required. This type arrangement would enable the New Company to adjust its load factor as the needs of the market might require. This, of course, would avoid the obligation to take the expensive Kingsgate gas at the fixed 90 per cent load factor which would give the New Company an advantageous flexibility in utilizing gas reserves from different fields within its system.

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[43]R. 160.
[43]R. 160.
[44]Deft. Ex. A; R. 1851, 162.
[45]Pltf. Ex. 8; R. 1754, 727.

(b) *The San Juan Gas Gathering Agreement.*

The original gas gathering contract for the San Juan Basin between El Paso and Pacific Northwest was negotiated and executed prior to the merger. Under it, the companies agreed to a reciprocal gathering charge of 1.35 cents per thousand cubic feet for gas gathered in the San Juan Basin. The unilateral change made in this agreement by El Paso contemplates an increase of the gas gathering rate to 4.5 cents per thousand cubic feet. The additional amounts which New Company will be required to pay for gas gathering services under this unilaterally changed contract are substantial. Evidence introduced by the Government at the divestiture hearings indicates that the annual increase in cost to New Company will exceed $349,000 for the first year's operation and over $644,000 by the fifth year's operation.[46]

If any changes are to be made in the provisions of either the Kingsgate Gas contract or the San Juan Gas Gathering contract, they should be made either (a) after arms-length negotiations between the New Company and El Paso, or (b) pursuant to orders and restrictions of the Federal Power Commission rendered after appropriately initiated and conducted hearings. Edison submits, however, that it is improper and contrary to this Court's mandate to permit the New Company to be arbitrarily saddled, as is done by the Decree, with these heavy continuing obligations which are based upon unilateral action taken by El Paso.

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[46]Pltf. Ex. 7; R. 1753, 709; R. 1409.

(3) The Decree of Divestiture Fails to Transfer to New Company Certain Stock in Westcoast Transmission Company Ltd. Owned by Pacific Northwest Before the Merger.

At the time of the merger, Pacific Northwest owned approximately 25 per cent of the stock of Westcoast Transmission Company Ltd.[47] That stock was carried on the Pacific Northwest's books at five dollars per share, and its ownership by Pacific Northwest gave that company an insight into Canadian gas supply prospects which otherwise would have been nonexistent.

Under the Decree of Divestiture entered by the District Court, El Paso will be allowed to sell this stock and retain the proceeds of sale. At the time of the hearing, the market value of this stock was fourteen to sixteen dollars per share.[48] Assuming the stock were to be sold at this price, there would be a profit of some ten to twelve million dollars (capital gains, no doubt), representing nine to eleven dollars per share on each of the 1,157,750 shares which were owned by Pacific Northwest prior to the merger.[49]

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[47]R. 628-629.

[48]R. 629.

[49]It is relevant here to make reference to the recent long-term contracts (mentioned *infra* in this brief at footnote 61) between El Paso and Westcoast under which El Paso commits (on behalf of New Company or other successor to the Northwest Division System) for substantially higher prices on existing Canadian gas supplies and for new supplies at similarly higher prices. (See FPC Dockets G-8932 and CP66-315.) The announcement of this new contract has had a further substantial effect of enhancing the value of the Westcoast stock to the tune of several dollars per share. (See New York Stock Exchange listing of Westcoast stock for period February 21, 1966 through March 7, 1966. as reported in Wall Street Journal issues of same dates. Westcoast sold at over 29 on March 7, 1966.) This would be to the further benefit of El Paso in the amount of several millions of dollars if Westcoast stock is to be divested by separate sale with the proceeds going to El Paso.

It is quite astonishing that under the decree and the El Paso plan of divestiture New Company will commence the operation of a quarter-billion dollar enterprise with only two hundred fifty dollars in working funds.[50] Unless New Company has a liquid asset like the West-coast stock, it will be necessary for it immediately to borrow substantial sums with which to commence its operations. In this respect, it is noted that New Company will be required to assume a debt of over one hundred eighty million dollars under the District Court's Decree of Divestiture,[51] while at the time of the merger Pacific Northwest had an indebtedness of only one hundred seventy-two million dollars. Therefore, during a seven-year period of operation under the illegal merger, the New Company finds that the debt, instead of having been retired in part, has been increased, and that in addition, it will be required to immediately borrow substantial sums (estimated at five million dollars)[52] with which to commence its operations. Even before it borrows any money for operations, the New Company will have one of the highest debt-to-equity ratios in the industry.[53] In this respect, Mr. Peter King, a pipeline official with experience in finance matters, testified that if the New Company's debt-to-equity ratio of 75 percent debt to 25 percent equity is not substantially reduced, "[I]t would make it very difficult for New Company to do any major new financing for quite a number of years down the road."[54] Mr. King also testified that, in his opinion, it would be neces-

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[50]Deft. Ex. A; R. 1873, 162.
[51]Deft. Ex. A; R. 1835, 162; R. 1873, 162.
[52]R. 585.
[53]Pltf. Ex. 21; R. 1827, 1192.
[54]R. 1196.

sary to reduce the New Company's debt level to 65 percent before it could safely finance a pipeline to California.[55]

Under these circumstances, it appears wholly illogical and contrary to this Court's mandate for the Westcoast stock to be divested separately from the Pacific Northwest System itself. This would appear to be particularly true where, as here, the New Company is sorely in need of a liquid asset, like the Westcoast stock, which could effect reductions in the New Company's debt ratio which the aforesaid testimony indicates are necessary to enable it to finance the construction of a pipeline to California. Also, it is important that the management of the New Company have the opportunity to determine the advantages of retaining an equity position in its Canadian supplies. This could be a decided advantage to the New Company in negotiating for additional gas supplies north of the Canadian border.

In contrast to the above, it is noted that the Decree of Divestiture distributes to New Company approximately 94 percent of the capital stock of Northwest Production Company. At the time of the merger, Pacific Northwest owned approximately 60 percent of the stock in this company.[56] Accordingly, the decree transfers to New Company all of the Northwest Production Company stock acquired during the illegal merger. It is significant, however, that in the period of 1960-1963, Northwest Production Company showed losses totaling $2,920,399.00 which represents almost 20 percent of Northwest Production Company's total assets,[57] where-

[55]R. 1197.

[56]R. 718; Deft. Ex. A; R. 1835, 162.

[57]R. 825-826.

as prior to 1960 Northwest Production Company was in a very favorable profit situation.

The mandate does not appear to justify El Paso or the Court in so "picking and choosing" between the assets which are to be transferred to the New Company.

(4) The Decree of Divestiture Fails to Compensate New Company for Certain Tax Loss Carry-Overs Possessed by Pacific Northwest at the Time of the Merger.

From 1955 through 1959, Pacific Northwest and its subsidiaries had net taxable losses totaling $53,820,698.99.[58] The entire amount of this tax loss was utilized by El Paso during the years following the merger.[59]

These tax losses occurred principally because Pacific Northwest had commenced business only a few years prior to the merger. They represented, therefore, in large part, the heavy, normally expected expenses which any new business enterprise will experience. At the time the losses were incurred, it was expected that Pacific Northwest would recoup them during the later years of more profitable operation, free from the heavy expense burden of getting started. However, the merger intervened and, as indicated, El Paso, the merged company, was able to utilize and to benefit from these large tax loss carry-overs.

Since these tax loss carry-overs were in a real sense an asset of Pacific Northwest utilized by El Paso, New Company should receive other assets or a reduction of its debt obligations of equivalent value in the divestiture proceedings. It is apparent that any compensa-

[58] R. 687.
[59] R. 726.

tion which New Company receives in recognition of these tax loss carry-overs will improve its debt-to-equity ratio, which will, in turn, increase the ability of the New Company to compete more effectively with El Paso and other companies engaged in the same business. Failure to recognize and compensate New Company for these tax loss carry-overs will, of course, reduce New Company's ability to compete and will place it in a comparatively weaker position than that occupied by Pacific Northwest at the time of the merger.

B. El Paso's Actual or Possible Continued Control of New Company.

Following the final hearing in the divestiture proceedings on February 4, 1965, El Paso made certain changes in the stock "spin-off" feature of its proposed decree of divestiture. These changes were incorporated in the proposed decree attached to the stipulation filed on May 24, 1965, and in the actual decree which was accepted and signed by the District Court on June 24, 1965.

The stock "spin-off" feature of the divestiture decree as entered by the District Court postpones for an indefinite period of time the actual divestiture of the assets which El Paso illegally acquired by the merger. It also makes it possible for the New Company to be controlled or influenced thereafter by El Paso or its stockholders. It is submitted that the Decree, in both such respects, violates the mandate of this Court which ordered divestiture without delay.

(1) The District Court Decree Postpones Actual Divestiture of Assets for an Indefinite Period and Leaves Elimination of Continuing Control in Doubt Even After Divestiture.

Paragraph 4 of the Decree of Divestiture directs El Paso to organize "New Company" which is then to employ a Chief Executive Officer to be approved by the Government, El Paso and the Court. Under the Decree, the New Company and its Chief Executive Officer are required to submit to the jurisdiction of the Court as parties and agree to be bound by the orders of the Court.

The New Company is then directed to file with the Federal Power Commission an application requesting the issuance of a certificate of public convenience and necessity to acquire and operate "the properties to be received from El Paso." Only at such time as the necessary certificates, authorizations, and orders are obtained from the Federal Power Commission is El Paso obligated to divest itself, by transfer to the New Company, "of the properties, assets and related liabilities set forth in the plan of divestiture." Although it may be anticipated that reasonable time for regulatory action will be required regardless of the method of divestment of El Paso's Northwest Division system, it is significant under the Court's Decree of Divestiture that the three year period for divestment of the New Company's stock does not commence until the regulatory approvals have been obtained. If a sale of the property is made, the divestiture can be finalized at the time the regulatory approvals are issued.

The New Company was brought into being pursuant to the Decree and the Chief Executive Officer thereof appointed. Edison is informed and represents that the New Company applied to the Federal Power Commission for certification, and that, as of the date of this brief, the New Company's application has not been approved.[60] Consequently El Paso continues to hold and to control the assets of Pacific Northwest which it acquired by the illegal merger and of which it was to have divested itself without delay according to the mandate of this Court entered on April 6, 1964 and the additional length of time which will be required by the Federal Power Commission to approve the New Company's request for certification is indefinite. Furthermore, in contrast to the situation which would obtain if the Northwest Division properties were sold (whereby divestiture could be completed at the time the regulatory authorizations issue), under the District Court's Decree, even after such certification, if and when that takes place, El Paso has an additional three years to divest itself of the New Company's stock [R. 2175].[61] In the meantime, El Paso will continue to assert complete control over these illegally acquired assets.

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[60]By its latest order in that proceeding, dated June 27, 1966, the Federal Power Commission granted its staff's motion to continue the proceedings until this Court has acted upon this appeal. (FPC Docket CP 66-27, *et al.*)

[61]In exercise of such control, Edison is informed and represents that El Paso has already entered into contracts and initiated regulatory proceedings involving large volume long-term gas purchase commitments with Westcoast for additional Canadian supplies at substantially increased prices (applied to both new supplies and those now under permanent FPC certificate) which could have far-reaching adverse effects on the ability of the New Company to compete for the California market in the future. (FPC Docket Nos. 8932 and CP66-315.) See also footnote 49 *supra*.

Moreoyer such divestment, if and when it is accomplished, in addition to its other infirmities, is subject to essentially the same infirmities which the government pointed out in its Brief After Divestiture Hearings with respect to El Paso's earlier "spin-off" proposal. True, the spin-off provision in the Decree contains language "permitting" El Paso to divest itself of New Company stock during the first eighteen months of said three-year period to El Paso stockholders who are willing to exchange their El Paso stock. But such divestiture arrangement is (1) *only* permissive with El Paso. In other words, El Paso has the option to resort to such divestiture means or not, at its sole discretion (subject to the willingness of El Paso stockholders to make such an exchange, of course) and (2) entirely optional with the El Paso stockholders themselves if and when El Paso exercises its discretion in favor of making such an exchange. If either (1) El Paso chooses not to adopt such a method of divestment, or (2) if El Paso stockholders choose not to make such an exchange, that method of divestment is completely ineffectual and El Paso is then left, during the second eighteen months of the three-year period, with a method of divestment subject to most of the same infirmities as the method of divestment it previously proposed (the "Proposed Decree for Divestiture" filed by El Paso with the District Court, February 23, 1965 [R. 1458.]).

It is true that the Decree of Divestiture requires the New Company stock to be offered to the public during the second eighteen-month period and (as in the case of the previously proposed Decree) disqualifies from purchasing said stock those that hold more than one-half (½) of one percent (1%) of the El Paso stock (but without excluding the members of the immediate fam-

ily of officers or directors or stockholders owning more than such percentage—contrary to the requirement of the previously proposed Decree). But the offering of the New Company stock to the public will not be a deterrent to El Paso's stockholders acquiring the stock (although concededly probably fewer El Paso stockholders would acquire New Company stock under that marketing procedure) and the limitation on purchase will eliminate fewer persons subject to control or influence of El Paso stockholders since there is no prohibition of purchase by members of El Paso stockholders' families.

El Paso will, of course, be entitled to the income from such assets for the period intervening between the date of the Decree of Divestiture and the time when the stock in the New Company is sold. No provision is made for the allocation to the New Company of any profits or increase realized from the merged property during this period. No provision is made for the allocation to the New Company of any additional gas reserves which might be acquired by El Paso during this indefinite interim period.

This provision of the Decree permitting El Paso to continue in control of and reap the benefit of these illegally acquired assets for an indefinite period, Edison submits also is contrary to this Court's mandate.

(2) El Paso's Continuing Interest After Actual Divestiture.

The Decree of Divestiture provides that at the time El Paso transfers to the New Company the assets affected by the Decree of Divestiture, the New Company shall, in turn, "issue to El Paso all of its capital stock." Under Paragraph 5 such capital stock shall, in turn, be transferred to the New Company's Chief Executive

Officer "as voting trustee, who shall thereafter exercise all voting rights with respect to such shares." Except for the power of the New Company's Chief Executive Officer to exercise voting rights in this stock, El Paso will continue to own the full, undivided interest therein for an extended period. It will, therefore, be entitled to any dividends voted on New Company stock. As the sole stockholder, it will be entitled to any increase in market value at the time of any sale and will otherwise be entitled to all rights of a stockholder.

(3) Potentially El Paso or Its Stockholders Could Influence or Dominate New Company Beyond the Time of Actual Divestiture.

El Paso played a principal role in the selection of the New Company's Chief Executive Officer. It is not necessary to suggest or imply that such officer is anything but an honest and upright person, or that there was any improper arrangement between El Paso and him, to question whether such circumstance would restore the competitive situation envisaged by this Court. It is true that the Chief Executive Officer is subject to the ultimate control and supervision of the District Court, but the Court's principal connection with this officer would normally be expected to be one of reviewing the corporate actions taken. Furthermore, the District Court's expressed views as to the real object to be achieved in the Divestiture suggest a lack of comprehension of the meaning and purpose of this Court's mandate.[62] These views reveal an attitude which could result

[62]During the course of the hearings the Court said:

"You see what this plan proposes is a division of the country, a division of the market, a division of the reserves, one area to New Company and another area to El Paso. That's what the root of this plan is." [R. 976].

in the Court overlooking or approving actions and conduct by the New Company and its officers which would not be in conformance with this Court's desires and mandate.

There is another aspect of the Decree of Divestiture which creates doubt and uncertainty as to whether thereunder the anti-competitive effects of the illegal merger will be completely removed. As mentioned above, subparagraph D of Section IV of the Decree [R. 2175] provides that El Paso shall, within three years of the transfer of assets to the New Company, divest itself of all of the shares of stock in New Company by one of two specified methods. The first method provides for such divestment by the distribution of at least 80 percent of the shares of the stock in New Company to holders of El Paso's common stock during the first eighteen months after transfer of the assets to the New Company, provided that such El Paso stockholders exchange their El Paso stock for stock in the New Company and that after the exchange they own no other shares of common stock of El Paso. Insofar as this arrangement complies with the so-called "Reading formula" it may pose no problem. The alternate method of disposing of the stock in New Company does not, we submit, comply with this Court's mandate. The alternate method contemplates a sale of the shares of stock in New Company to the general public during a second eighteen-month period if the 80% are not disposed of during the first eighteen-month period. It does not, however, impose any restriction on the purchase of New Company stock by El Paso stockholders during said second eighteen-month period, except that:

> "no Officer or Director of El Paso and no owner of capital stock of El Paso in excess of one-half of

one percent of the total shares outstanding shall be permitted to purchase any stock in New Company upon such sale or sales."

As noted above, this restriction does not even extend to the families of the officers and directors of El Paso or to the families of those owning more than one-half of one percent of the El Paso stock. At the time of the hearings, there were 22,938,396 outstanding shares of El Paso's stock. One-half of one percent of this total equals 114,692 shares.[68] Exclusive of the officers and directors of El Paso, this means that only four of the approximately 117,000 El Paso stockholders would be barred from purchasing stock in the New Company. Furthermore, there are 21 beneficial owners of El Paso's stock, each holding shares valued at $1,000,000 or more and together they account for 9.54 percent of the total outstanding shares. If the brokerage houses that own $1,000,000 or more in El Paso's shares are included, there is a total of 38 accounts representing 18.43 percent of all outstanding shares. If a lower valuation point of $500,000 is used, it appears that there are 82 accounts that hold approximately 5,795,592, or about 25.2 percent of all outstanding shares of El Paso. Since any sale of the stock of New Company is to be conducted by El Paso (subject, of course, to approval by the Court of the underwriting agreement), it is possible that the sale could be handled and managed in such a way as to enable a small group of El Paso's stockholders to acquire enough of the stock of the New Company to insure control of it. These stockholders, who are not restricted by the Decree, or the families of those who are restricted by the Decree,

[68]Deft. Ex. H; R. 1904, 637.

could purchase stock in the New Company without limit. By this device it would be entirely possible for a small group of El Paso's stockholders or the families of stockholders or of officers and directors to acquire domination of the New Company and thereby thwart this Court's mandate. Edison does not suggest that this is what actually is planned or will be done. It does suggest that the decree creates the "possibility" that it might be done.

It is abundantly clear, in any event, that the requirement for divestiture without delay of this Court's mandate will not be met under the Decree of the District Court.

2. IS EDISON ENTITLED TO INTERVENE AS A MATTER OF RIGHT UNDER RULE 24(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE?[64]

A. Does Edison Have a Protectible Interest in the Divestiture Proceedings?

The principal issue in *United States v. El Paso* in which this Court rendered its mandate for divestiture was whether or not the El Paso-Pacific Northwest merger "lessened competition in the sale of natural

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[64]Effective July 1, 1966, Rule 24(a) was amended to read as follows: (matter stricken out is in brackets; new matter is in italics.)

"(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the [representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.] *applicant claims an interest relating to the property or transaction which is the subject of the action and he is*

(This footnote is continued on the next page)

gas in California."[65] Consequently, the chief objective of the divestiture proceedings should be to establish the New Company in as strong a competitive position for the California markets as Pacific Northwest occupied prior to the merger. Edison's real and substantial interest in that objective and in the conduct and outcome of the divestiture proceedings is readily apparent.

Edison is incorporated under the laws of California. It is a California public utility engaged in the generation, transmission, distribution and sale of electricity in the southern California area and elsewhere. It uses natural gas to satisfy approximately 75% of its fuel requirements in generating electricity. In 1964 alone it utilized over 189 billion cubic feet of gas at a cost of about $65 million making it the largest single consumer of natural gas in southern California. Fuel costs represent Edison's largest item of cost other than taxes and labor.

The population of the area served by Edison is presently in excess of six million people. Projections of significant population growth and industrial expansion in the area indicate corresponding huge increases in electrical demands and fuel requirements in the near future.

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so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Edison contends that based upon the reasons and authorities cited in this brief, it is entitled to intervene as a matter of right under Rule 24(a) as it existed before the amendment. Edison also contends, however, that the Rule, as amended, may properly be applied by the Court on this appeal since the change relates only to a procedural matter; does not infringe vested rights, and was adopted with no expressed intention of excluding its applicability to litigants involved in pending cases. (*Cf., U. S. v. State of Alabama*, 360 U.S. 802, 80 S. Ct. 924 (1960)).

[65] 376 U.S. 651, 652.

This Court's comments in the decision which ordered divestiture further demonstrate the integral role Edison occupies in this litigation and the important interest it has in its outcome:

> "In 1956 it indeed engaged in negotiations for the sale of natural gas to Southern California Edison Co. (Edison). The latter, largest industrial user of natural gas in Southern California, used El Paso gas, purchased through a distributor. It had, however, a low priority from that distributor, being on an 'interruptible' basis, i.e., subject to interruption during periods of peak demand for domestic uses. Edison wanted a firm contract and, upon being advised that it was El Paso's policy to sell only to distributors, started negotiations with Pacific Northwest in May 1956. The idea was for Pacific Northwest to deliver to Edison at a point on the California-Oregon border 300 million cubic feet of Canadian gas a day. In July 1956 they reached a tentative agreement. Edison thereupon tried to develop within California an integrated system for distributing Canadian gas supplied by Pacific Northwest to itself and others. El Paso decided to fight the plan to the last ditch, and succeeded in getting (through a distributor) a contract for Edison's needs. Edison's tentative agreement with Pacific Northwest was terminated. Before Edison terminated that agreement with Pacific Northwest, Edison had reached an agreement with El Paso for firm deliveries of gas; and while the original El Paso offer was 40¢ per Mcf, the price dropped to 38¢ per Mcf, then to 34¢ and finally to 30¢. Thereafter, and while the merger negotiations were pending, Pacific Northwest renewed its efforts to get its gas into California." (376 U.S. 651 654.)

B. May Edison Be Bound by the Decree of Divestiture?

If the District Court's Decree of Divestiture is permitted to stand and if Edison is denied the right to intervene, it will be finally and irrevocably bound. It will have no legal recourse or remedy whatsoever to assert its interest in having New Company established as a competitive force in the California markets.

Under these circumstances, what sound rule or reason can be advanced to urge that Edison will not be bound? The only suggestion on this point made in the motions to dismiss or affirm was made by the Government [Motion of U.S. to Dismiss, p. 5] when it said:

> "Appellant cannot establish that it will be 'bound' by the decree merely by showing its 'interest' in the divestiture proceedings (J.S. 7, 11, 17), which coincides with the public interest in creating New Company as a viable, independent corporation, capable of performing as a vigorous competitor."

Citing the *Sam Fox Publishing Co.* case.[66]

However, Edison's position is wholly unlike that of the would-be intervenors in the *Sam Fox Publishing Company* case. There the parties denied intervention clearly had other legal remedies available to protect their interests. Under those circumstances, the Court decided that there was "no rule or policy requiring them to press their claim against ASCAP in this government litigation."[67] Here, however, Edison would have no remedy available to attempt to establish New

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[66] *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 6 L. Ed. 2d 604, 818 S. Ct. 1309.

[67] *Ibid.*, 366 U.S. 683, 694.

Company as a viable competitor in the California gas markets unless it is permitted to intervene.

Edison would have no legal or equitable remedy in any court against either El Paso or New Company which could alter the anti-competitive effects of the decree. Neither would Edison have a remedy before the Federal Power Commission by which it could alter the effects of a Decree of Divestiture which straitjackets New Company to serve the Pacific Northwest markets and to preclude it from the California markets. That Commission is without authority to order new gas supply projects, its jurisdiction under the Natural Gas Act being limited, essentially, to approval, with or without condition, or rejection, of applications presented to it for consideration. (Cf., *Natural Gas Pipeline Company of America, et al.*, FPC Docket CP62-243, *et al.*, FPC Opinion No. 474, issued September 9, 1965 (61 Pur. 3d 113).) In short, there would be no place to which Edison could turn for redress.

C. Are the Interests of Edison Being Adequately Represented?

As is shown elsewhere in this brief, Edison's chief interest in the divestiture proceedings below is that the New Company be established in a position comparable to that occupied by Pacific Northwest before the merger to enable it to compete effectively for the California markets. During all of the hearings in the divestiture proceeding from July 8, 1964, until February 4, 1965, this interest was ably and vigorously represented by the Government.[68] Even after the Court hearings were concluded and the evidence was all in,

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[68]See facts related in Statement of Case above, Section IV.

the Government continued aggressively for a time to represent and assert that interest.[69]

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[69]Typical of the repeated expressions of concern by the Government, prior to its entering into the stipulation, for the restoration of competition for the California market are the following:

a. Plaintiff's (Government's) Brief After Divestiture Hearings, filed February 19, 1965, page 1 [R. 1416]:

"In general, the object sought by the Government has remained constant throughout these proceedings. We seek to reconstitute Pacific Northwest Pipeline Corporation—or New Company—as a viable pipeline, able to serve its markets and able to expand to serve other markets. We seek to re-establish this company in such a way as to enable it to offer competition to El Paso *for the California market* and elsewhere." (Emphasis added.)

b. Plaintiff's (Government's) Brief Opposing El Paso's Plan Of Divestiture, filed January 6, 1965, pages 13-14: [R. 1063-1065]

"In order that New Company will be in a position to compete for a share *of the California market* it must have at its command gas reserves in excess of what is proposed to be turned over to it by El Paso through the divestiture proceeding." (Emphasis added.)

* * *

"The Supreme Court referred in its opinion to the location of the gas reserves of Pacific Northwest in relation to the potential *California market* and stated that had Pacific Northwest remained independent it no doubt would have sought to exploit its formidable geographical position *vis-a-vis California.*" (Emphasis added.)

"It would seem indisputable that a divestiture in accordance with the intent and purpose of the Supreme Court, in holding that El Paso had unlawfully acquired the stock of Pacific Northwest because such acquisition had the effect of lessening competition, must result in restoration of New Company to substantially the same position it had prior to acquisition, i.e., of having enormous gas reserves in the San Juan Basin strategically located with respect to *the California market*. El Paso should not be permitted, in purported compliance with the decision of the Supreme Court, to place the New Company at a disadvantage insofar as being a potential competitor *in the California Market* through denying New Company its fair share of the additional gas reserves which have been developed during the intervening eight years when El Paso had complete control of the acquisition by Pacific Northwest of gas reserves in the San Juan Basin." (Emphasis added.)

(This footnote is continued on the next page)

Between February 19, 1965, and May 24, 1965, however, the Government completely abandoned its opposition to El Paso's proposals. On the latter date, it stipulated to a decree which embodied the very points it had so strongly opposed throughout the hearings and which were so crucial to the ability of the New Company to compete for the California market.

The record is devoid of any reason or justification for the Government's changed position. We are, therefore, left to conjecture at the cause of this sudden[70]

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c. Plaintiff's (Government's) Memorandum, filed January 6, 1965, On Divestiture Of A Portion Of The San Juan Gas Reserves Acquired Since The Merger, pages 6-8: [R. 1088-1089]

> ". . . Moreover, to permit El Paso to preclude Pacific Northwest (New Company) from obtaining any part of these reserves, which are the closest *to the Californiar market,* would be to permit it to impede through that device the ability of the New Company *to serve the California market* and thus permit those reserves to be 'utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends' of the illegal merger . . ." (Emphasis added.)
>
> * * *
>
> ". . . As has been shown, to permit El Paso to retain all of these reserves would allow it to retain the fruits of its illegal conduct. It would also give to El Paso a decided advantage in competing to serve new increments of demand *in the California market,* and thus would fail to restore the competitive status quo as it existed at the time of the merger." (Emphasis added.)

d. See also Plaintiff's (Government's) Memorandum, filed February 3, 1965. Summarizing The Condition Of Pacific Northwest At The Time Of Its Merger With El Paso, pages 1, 2, 10, 12-15 [R. 1370-1371; R. 1373; R. 1381-1382; R. 1384-1387] and Plaintiff's (Government's) Proposed Findings Of Fact And Conclusions Of Law, filed February 19, 1965, [R. 1401].

[70]The El Paso proposal for divestiture was first made available to the Government in about April 1964 [R. 827; Deft. Ex. L; R. 1911, 827]. That proposal was then fought vigorously by the Government throughout the hearings, a period of almost eight months. The exact point at which or the process by which the Government's opposition evaporated is, of course, not known. However, the first official revelation of that abrupt change was made when the May 24, 1965, stipulation was made public. It was unforeseen, unexpected and therefore sudden.

and inexplicable about face. In any event, from and after May 24, 1965, it was and is apparent that the interests of Edison were no longer being adequately represented by the Government. This fact prompted and supports Edison's Application for Leave to Intervene.

It is clear from the record that the Government's position throughout the divestiture proceedings with reference to the defects in El Paso's Plan of Divestiture was practically identical to the position taken by Edison on this appeal. That position was premised on the assumption that the principal object of divestiture is to constitute New Company as a viable competitor for the California markets. Illustrative of this view is the following statement of Government counsel made at the hearing of December 10, 1964:

> "I think it is clear from the opinion (of this Court in *U. S. v. El Paso*) that *the California market* must be regarded as the very corner stone of the case."[71] (Emphasis added).

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[71] [R. 963]. In the same vein are the following statements of Government counsel made at the hearing of December 9, 1964:

> "And I suggest, your Honor, that the emphasis of this case is not on the position that New Company will have or may have in the Northwest area, but the emphasis in the case, your Honor, should be with respect *to California* and its ability to compete with El Paso and others *in the California market*." [R. 868]. (Emphasis added.)

See also:

(a) Plaintiff's (Government's) Brief Opposing El Paso's plan of divestiture, filed January 6, 1965, pages 13-14: [R. 1063-1065]

> "In order that New Company will be in a position to compete for a share *of the California market* it must have at its command gas reserves in excess of what is proposed to be turned over to it by El Paso through the divestiture proceeding." (Emphasis added.)
>
> * * *
>
> "The Supreme Court referred in its opinion to the location of the gas reserves of Pacific Northwest in relation to the

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All of the Government's criticisms of the El Paso plan were aimed at specific proposals which weakened New Company's competitive position, especially with respect to the California markets. Their criticisms were directed primarily to two areas:

(1) Those aimed at proposals which impaired New Company's independence, and

(2) those aimed at proposals which impaired New Company's corporate strength and capacity.

The first affected the New Company's *will* to compete and pertained chiefly to the proposed stock spin-off. The second affected the New Company's *ability* to compete and pertained to the allocation of gas reserves, retention of the Westcoast stock by El Paso,

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potential *California market* and stated that had Pacific Northwest remained independent it no doubt would have sought to exploit its formidable geographical position *vis-a-vis California.*" (Emphasis added.)

* * *

"It would seem indisputable that a divestiture in accordance with the intent and purpose of the Supreme Court, in holding that El Paso had unlawfully acquired the stock of Pacific Northwest because such acquisition had the effect of lessening competition, must result in restoration of New Company to substantially the same position it had prior to acquisition, *i.e.*, of having enormous gas reserves in the San Juan Basin strategically located with respect *to the California market.* El Paso should not be permitted, in purported compliance with the decision of the Supreme Court, to place the New Company at a disadvantage insofar as being a potential competitor *in the California market* through denying New Company its fair share of the additional gas reserves which have been developed during the intervening eight years when El Paso had complete control of the acquisition by Pacific Northwest of gas reserves in the San Juan Basin." (Emphasis added.)

(b) Plaintiff's (Government's) Memorandum, filed January 6, 1965, On Divestiture of a Portion of the San Juan Gas Reserves Acquired Since the Merger, pages 6-8: [R. 1088-1089]

". . . Moreover, to permit El Paso to preclude Pacific Northwest (New Company) from obtaining any part of

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unilateral alteration by El Paso of certain contracts and failure to credit New Company with certain pre-merger tax loss carry-overs. Government counsel underscored these two chief aspects of the divestiture when, at the February 3, 1965 hearing, the mandate of this Court was interpreted as requiring the District Court properly to arrange the *"ownership"* and *"composition"* of the New Company.[72]

When the Government was unable to obtain concessions on these points during the hearings, it recognized and asserted that the New Company would be weaker and less able to compete for the California markets than was Pacific Northwest before the merger.[73] At

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these reserves, which are the closest *to the California market*, would be to permit it to impede through that device the ability of the New Company *to serve the California market* and thus permit these reserves to be 'utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends' of the illegal merger . . ." (Emphasis added.)

* * *

". . . As has been shown, to permit El Paso to retain all of these reserves would allow it to retain the fruits of its illegal conduct. It would also give to El Paso a decided advantage in competing to serve new increments of demand *in the California Market*, and thus would fail to restore the competitive status quo as it existed at the time of the merger." (Emphasis added.)

(c) See also Plaintiff's (Government's) Memorandum, filed February 3, 1965, Summarizing the Condition of Pacific Northwest at the Time of its Merger with El Paso, pages 1, 2, 10, 12-15 [R. 1370-1371; R. 1373; R. 1381-1382; R. 1384-1387] and Plaintiff's (Government's) Proposed Findings of Fact and Conclusions of Law, filed February 19, 1965, pages 4 and 9. [R. 1401].

[72]R. 1272.

[73]At the hearing on December 4, 1964, Government counsel said:

"Your Honor, Pacific Northwest, the Supreme Court found, was not a feeble competitor. It posed a real threat

(This footnote is continued on the next page)

the February 4, 1965 hearing, Government counsel in answer to the Court's question as to whether New Company was "feeble," said:

> "Your Honor, in a certain respect, that is what the Government is saying; and that is with respect to competition for the California market. This company that is being set up under the El Paso proposal is, if I may use the word, straightjacketed to serve the Northwest markets. It is not in any position to serve the California markets."[74]

This "straightjacketing" of the New Company to serve the Northwest markets effectively precludes it from the California markets. This result was inherent in the El Paso proposals from the outset. The District Court recognized, but appears to have approved this "straitjacketing" concept when at the hearing it said:

> "You see, what this plan proposes is a division of the country, a division of the market, a division of the reserves, one area to New Company and another area to El Paso. That's what the root of this plan is."[75]

This result, of course, has been embodied in the Decree of Divestiture. Thus, the chief adverse effect of the

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to the California market. If Pacific Northwest is not given an opportunity to have some fair allocation of the post merger gas that El Paso and Pacific Northwest combines, as a merged company, developed in the San Juan Basin after the merger date, they will, in fact, be created to be a feeble competitor in the California market." [R. 772.] "But we think in all fairness, some allocation of the San Juan gas must be made to New Company in order to enable it to start to compete, to be in a position where it is a competitive threat to the California market." [R. 774.]

[74] R. 1355.

[75] R. 976.

unlawful merger has curiously been reinstated and perpetuated through the District Court's decree.

As has already been pointed out, the Government's unyielding opposition to the El Paso plan continued on all fronts through the divestiture proceedings and until the brief after the divestiture hearings was filed on February 19, 1965. Then the opposition unexpectedly dissolved and disappeared.

It is to be noted that the Decree of Divestiture entered by the District Court is essentially the same as the El Paso proposed decree which the Government vigorously opposed throughout the divestiture proceedings except that certain changes were made in the manner in which the stock in New Company was to be distributed. As is noted above, however, this aspect of the El Paso proposal pertained only to the *independence* of New Company or its *will* to compete. Even as to this aspect the analysis contained in a preceding section (Section VI B) of this argument shows that the Decree of Divestiture does not assure that the New Company will be free and independent of the domination or control of El Paso or its stockholders.

Furthermore, as to the corporate strength of New Company or its *ability* to compete, the Decree of Divestiture is identical with the El Paso proposals. Thus, because of the provisions of that decree pertaining to the allocation of gas reserves, disposition of the West-coast stock, unilateral changes made in certain contracts by El Paso, and failure to give New Company credit for the tax loss carry-overs, New Company, under the Decree of Divestiture entered by the District Court, will be as characterized by Government counsel during the divestiture hearings, a feeble company and lacking in

the ability to compete for the California markets. No matter how strong the will to compete for the California market (itself a questionable result of the Decree as entered), the lack of such ability to compete on the part of New Company will have the effect of perpetuating the very wrong this Court's mandate was designed to correct.

3. IS EDISON SO SITUATED THAT IT WILL BE ADVERSELY AFFECTED BY THE DISPOSITION OF PROPERTY TO THE NEW COMPANY UNDER THE DECREE OF DIVESTITURE WITHIN THE MEANING OF RULE 24(a)(3)?

Edison has described in detail above the aspects of the District Court's Decree of Divestiture which Edison thinks precludes compliance with the mandate of this Court. Those matters of complaint relate to the manner in which certain properties acquired by the illegal merger are to be disposed of on divestiture. Edison's position is, of course, that the manner of disposition of the stock in New Company and the failure of El Paso to distribute to New Company certain properties will prevent New Company from being an independent, viable competitor for the California markets. Because of Edison's clear and undeniable interest in these California markets, there is no doubt but that Edison will be adversely affected. Those adverse effects flow naturally from the fact that the New Company will be unable to effectively compete in the California markets.

It hardly seems necessary for Edison to point out the benefits to it of competition in the sales of gas to the California market; as has been previously observed, one would have to wear blinders not to see it. As this Court noted in its decision ordering divestiture, the

mere threat of Pacific Northwest to enter the California markets resulted in El Paso granting to Edison significant price and priorty concessions in the sale and purchase of gas.

In these circumstances, Edison respectfully submits that it may intervene in the proceedings below as a matter of right to attempt to prevent the improper, and to Edison, harmful disposition of the properties involved in the divestiture.

4. DID THE DISTRICT COURT'S DENIAL OF EDISON'S APPLICATION FOR LEAVE TO INTERVENE CONSTITUTE AN ABUSE OF DISCRETION WITHIN THE MEANING OF RULE 24-(b)?

The District Court was acutely aware of the vigorous, uncompromising opposition which the Government made to the El Paso proposals throughout the divestiture hearings.[76] The District Court was also aware of the detailed, well-documented reasons which the Government counsel gave to support its opposition. That opposition, of course, extended beyond the hearings and was reasserted and reemphasized in the Government's Brief After Divestiture Hearing [R. 1415]. In view of the state of the record and the representations made by Edison in its letter to the Court dated June 11, 1965,[77] it is submitted that the Court abused its discretion in failing to permit Edison to intervene as a means of helping to

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[76]See facts related in Statement of Case above. Also note the following statement of the Court made at the hearing of February 23, 1965: "You have opposed everything that has come along the road, everything. When we started these hearings way last year, you came in and said you opposed, the Government opposed, El Paso's proposals in totality, and you have demonstrated it ever since." [R. 1279.]

[77]R. 2040.

clarify matters about which the Court, on the basis of the record, should have had some doubt. Perhaps the action of the Court in denying Edison's request to intervene could have been anticipated in view of its pronouncements during the hearings as to the true objects of the divestiture. However, the fact that the Court's action in denying intervention may have been predictable does not mean that the act was properly within the realm of its discretion.

VII.
CONCLUSION.

If the District Court's Decree of Divestiture were permitted to stand, Edison submits that the New Company would be straight-jacketed in a manner which would preclude it from competing for the California markets. By this means, the mandate of this Court would be thwarted. This would result, we submit, in El Paso losing the battle but winning the war.

In view of the fact that it has already ordered divestiture, Edison submits that this Court has plenary authority to take such steps as are needed to insure that its mandate will be carried out. For this reason, Edison suggests that, on the basis of the record now before the Court, it should enter such orders as it considers necessary to obligate the District Court to comply with the mandate. It is also suggested that this might be accomplished by directing the District Court to enter a decree similar or identical to the one proposed by the Government in the divestiture proceedings; or by laying down guidelines to control the District Court in permitting participation of intervenors and in entering a substitute Decree of Divestiture.

Any of these suggested courses of action presuppose that this Court would formally cancel and nullify the Decree of Divestiture already entered by the District Court. For the reasons mentioned in the body of this brief, Edison submits that the Court has the inherent power and authority so to cancel the Decree of Divestiture if it is determined to be contrary to this Court's mandate and to take such other steps deemed by it appropriate to see that its mandate is carried out.

Respectfully submitted,

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